CHOW KOK KEONG

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
EDGAR JOSEPH JR FCJ
NH CHAN JCA
[CRIMINAL APPEAL NO: 05-96-93]
14 NOVEMBER 1997

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B(1)(a) - Trafficking in heroin - Trial - Defence that actual trafficker was someone else - Whether a valid defence - Failure of trial judge to adequately deal with defence - Whether showing lack of appreciation of the evidence - Whether a misdirection - Whether trial vitiated - Whether conviction and sentence thereof proper - Dangerous Drugs Act 1952, ss. 6, 37(d), 37(da), 39A(2), 39B(1)(a)*

The appellant was arrested while having in his custody and control a bag containing 86.6g of heroin and was charged with trafficking in the said drug pursuant to s. 39B(1)(a) Dangerous Drugs Act 1952 ('the Act'). In the court below, the appellant had put up a defence that he did not know the contents of the bag, and that the bag was given to him by one Ah Seng who told him that it contained food. All along it was the appellant's stand that he had narrated his defence thus to the police at the time of his arrest, and had thereafter directly led the police party to a karaoke lounge in Setapak to look for one Ah Seng. The facts also showed that the evidence about the appellant directly leading the police party to the karaoke lounge in search of Ah Seng was corroborated by PW6, though PW6 subsequently changed his story and asserted that the appellant, after his arrest, was first taken to Sentul police station, and only after interrogation thereat that he led the police party to the karaoke lounge.

The learned judge, whilst admitting that Ah Seng could possibly exist, ruled nonetheless that the appellant's story about Ah Seng giving him the bag was a mere concoction of the appellant, and that the appellant, in reality, had said nothing to the police upon his arrest and had only belatedly disclosed his defence while at the Sentul police station. The learned judge, in consequence, rejected the appellant's defence and, having examined the definition of trafficking in s. 2 of the Act and the case of *Teh Geok Hock v Public Prosecutor,* convicted the appellant. The appellant appealed and argued that his trial herein was vitiated by the learned judge's failure to adequately deal with his defence, and that, if at all, he was only guilty of an offence of possession under s. 6 of the Act punishable under s. 39A(2) thereof.

Held:

Per Edgar Joseph Jr FCJ

[1] The defence of the appellant was not a bare denial but an explanation indicating that someone else, not he, was the trafficker.

[2] The evidence that the appellant, after being cautioned at the place of arrest, led the police party directly to the karaoke lounge in search of Ah Seng, was clear indication that when cautioned at the time of arrest, the appellant must have disclosed his defence, for how else does one account for the police party proceeding from the scene directly to the karaoke lounge in Setapak. This was a point in evidence for the prosecution which told strongly in favour of the appellant since, having regard to the common course of human conduct, someone who is highly aroused is not likely to have had time to construct lies.

[3] It is true that Dzuraidi, at a later stage, resiled from what he had said, and asserted that when cautioned and questioned at the time of his arrest, the appellant refused to reply, whereupon the police took him to Sentul police station where he was interrogated, and it was only subsequently that he led the police to the karaoke lounge in search of Ah Seng. The fact remains that Dzuraidi had said something different earlier and that no attempt had been made by him to explain the contradiction although it was most material. There was thus, at the very least, an ambiguity on this particular point in the testimony of Dzuraidi. There should be no ambiguity upon a matter where the life of a subject is involved.

[4] In rejecting the defence of the appellant, and finding that the appellant was not telling the truth, the judge had relied heavily on what he thought was the belated disclosure of his defence by the appellant.

[4a] It is obvious that the learned judge, in making the strong findings of fact adverse to the defence, had overlooked the earlier testimony of Dzuraidi which corroborated the testimony of the appellant that it was at the time and place of his arrest that the appellant had disclosed his defence. This indicated a lack of "due appreciation" of the evidence, and so, was a serious misdirection by way of non-direction for, had the judge correctly directed himself in this regard, he might well have looked at the defence more sympathetically.

[4b] Also, in the situation that obtained herein, it was open to the defence to contend that if the whole matter had been probed, the judge might have felt unable to accept the police evidence at all on the ground that if the testimony of the police witness was unreliable as to **when** the appellant had made disclosure of his defence, their testimony as to **other matters** might also be unreliable.

[5] The learned judge, in relying on the definition of trafficking in s. 2 and the decision in *Teh Geok Kock v. Public Prosecutor* when rejecting the appellant's defence, had overlooked the more recent decisions in *Cohen Lorraine Philis & Anor v. Public Prosecutor* and *Ng Chai Kem v. Public Prosecutor* that, in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be *available* even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s. 37(d) of the Act.

[5a] Both *Cohen* and *Ng Chai Kem* have severely watered down *Teh Geok Hock* in so far as it implies that passive possession or self-administration can never be a defence to a charge of trafficking under s. 39(B) of our Act. Having considered this point afresh, we preferred the views expressed in *Cohen* and *Ng Chai Kem* to those in *Teh Geok Hock.*

[6] Section 2 of the Act which defines "trafficking" comes with the phrase "In this Act, *unless the context otherwise* requires". It is our view that, in this respect, the context of s. 37(da)(i) does "otherwise require", as otherwise, the provisions of s. 37(da) which specifically confer upon the accused *the right* to rebut the presumption of trafficking arising from being found in possession of dangerous drugs in excess of the statutory minimum, would be an empty hypocrisy.

[7] The learned judge had erred in his handling of the facts when considering the case for the defence, and had also placed undue stress on s. 2 of the Act. The conviction for trafficking under s. 39B of the Act was thus unsustainable and the right course to take was to substitute it with a conviction under s. 6 of the Act punishable under s. 39(A)(2) thereof.

[Appeal allowed; conviction and sentence of court below set aside and substituted with a conviction for possession under s. 6 of Act and a sentence of 18 years imprisonment and 10 strokes of the rottan.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu telah ditahan ketika mempunyai dalam jagaan dan kawalannya sebuah beg yang berisi 86.6 gram dadah heroin dan telah dituduh mengedarkan dadah tersebut selaras dengan s. 39B(1)(a) Akta Dadah berbahaya 1952 ('Akta tersebut'). Perayu telah membuat pembelaan dengan menyatakan bahawa beliau tidak mengetahui langsung mengenai kandungan beg tersebut, dan bahawa beg tersebut telah diberikan kepada beliau oleh seorang yang bernama Ah Seng yang telah memberitahu beliau bahawa beg tersebut mengandungi makanan. Adalah merupakan pendirian perayu bahawa beliau telah pun menyatakan pembelaan beliau tersebut kepada pihak polis ketika beliau ditahan, dan bahawa, beliau juga, selepas itu, terus membawa sekumpulan polis ke sebuah Karaoke Lounge di Setapak untuk mencari Ah Seng.

Fakta menunjukkan bahawa keterangan mengenai perayu membawa pasukan polis terus ke Karaoke Lounge tersebut untuk mencari Ah Seng telah disokong oleh PW6, walaupun PW6 kemudiannya mengubah ceritanya dan menegaskan bahawa perayu, selepas penangkapannya, telah pertamanya di bawa ke Balai Polis Sentul, dan hanya selepas disoal-siasat di sana barulah beliau membawa pasukan polis ke Karaoke Lounge.

Hakim yang bijaksana, sementara mengakui bahawa Ah Seng mungkin benar-benar wujud, bagaimanapun telah memutuskan bahawa cerita perayu mengenai Ah Seng memberikan beliau beg tersebut adalah semata-mata suatu rekaan perayu, dan bahawa perayu, sebenarnya, tidak menyatakan apa-apa kepada pihak polis sebaik sahaja beliau ditahan dan hanya mendedahkan pembelaannya itu ketika berada di Balai Polis Sentul. Hakim yang bijaksana, akibat itu, telah menolak pembelaan perayu, dan, setelah meneliti definasi pengedaran dadah dalam s. 2 Akta dan kes *Teh Geok Hock lwn. Pendakwa Raya*, telah mensabitkan perayu dan menjatuhkan hukuman mati terhadap beliau. Perayu merayu dan berhujah bahawa perbicaraan beliau telah dicacatkan oleh kegagalan hakim untuk menimbang dengan secukupnya pembelaan beliau, dan bahawa, jika beliau bersalah sekalipun, beliau hanya bersalah atas kesalahan pemilikan di bawah s. 6 Akta yang boleh dihukum di bawah s. 39A(2).

Diputuskan:
Oleh Edgar Joseph Jr HMP

[1] Pembelaan perayu tidak merupakan penafian semata-mata tetapi adalah satu penjelasan yang menunjukkan bahawa seorang yang lain, bukannya beliau, adalah pengedar dadah tersebut.

[2] Keterangan bahawa perayu, setelah diberi amaran di tempat penahanan, telah membawa pasukan polis terus ke Karaoke Lounge bagi mencari Ah Seng, jelas menunjukkan bahawa apabila diberi amaran ketika ditahan, perayu pastinya telah menyatakan pembelaannya disitu, kerana, bagaimana pula seseorang boleh menjelaskan mengenai pasukan polis yang terus menuju ke Karaoke Lounge di Setapak itu. Ini merupakan seperkara dalam keterangan bagi pihak pendakwaan yang memihak dengan tegasnya kepada perayu oleh kerana, memandangkan perlakuan manusia yang biasa, seseorang yang berada dalam keadaan yang amat terdesak tidak mungkin mempunyai masa untuk memikirkan suatu pembohongan.

[3] Adalah benar bahawa Dzuraidi, kemudiannya telah bingkas daripada apa yang dinyatakannya, dan menegaskan bahawa ketika diberi amaran dan disoal tatkala ditahan, perayu telah enggan menjawab, yang berakibat polis telah membawa beliau ke Balai Polis Sentul di mana beliau telah disoal-siasat dan hanya sejurus selepas itu beliau telah membawa pasukan polis ke Karaoke Lounge bagi mencari Ah Seng. Faktanya tetap kekal bahawa Dzuraidi telah menyatakan sesuatu yang berlainan pada awalnya dan bahawa tiada percubaan telah dibuat oleh beliau untuk menerangkan percanggahan tersebut walaupun ianya amat penting. Dengan itu terdapat, sekurang-kurangnya ketidak-pastian mengenai perkara yang khusus ini dalam testimoni Dzuraidi. Tidak seharusnya wujud kekaburan mengenai sesuatu perkara di mana nyawa seseorang tergugat.

[4] Dalam menolak pembelaan perayu, dan mendapati bahawa perayu tidak menyatakan perkara yang sebenarnya, hakim telah bergantung sepenuhnya ke atas apa yang beliau fikirkan adalah pendedahan lewat mengenai pembelaan dirinya oleh perayu.

[4a] Ianya jelas bahawa hakim yang bijaksana, dalam membuat keputusan yang tegas mengenai fakta yang memudaratkan pembelaan tersebut, telah tidak memberikan perhatian kepada testimoni Dzuraidi yang lebih awal yang menyokong testimoni perayu bahawa di tempat dan waktu penahanan beliau, beliau telah menyebut atau menyatakan pembelaannya. Ini menunjukkan tiada "penghargaan yang wajar" mengenai keterangan tersebut dan oleh itu, merupakan suatu salah arahan yang serius melalui atau dengan cara ketiadaan arahan kerana, sekiranya hakim telah mengarahkan dirinya dengan betul sehubungan dengan perkara itu, beliau mungkin akan mempertimbangkan pembelaan tersebut dengan secara berehsan yang lebih.

[4b] Juga, dalam situasi ini, ianya adalah terbuka kepada pihak pembelaan untuk menegaskan bahawa sekiranya perkara tersebut telah disiasat, hakim mungkin berasa tidak dapat menerima keterangan polis itu sama sekali atas alasan bahawa jika testimoni saksi polis tersebut tidak boleh dipercayai berhubung dengan bilakah perayu telah menyatakan pembelaannya, testimoni mereka berhubung dengan perkara-perkara lain mungkin juga tidak boleh dipercayai.

[5] Hakim yang bijaksana, dalam bergantung pada definisi pengedaran dadah dalam s. 2 dan keputusan dalam kes *Teh Geok Kok lwn Pendakwa Raya* ketika menolak pembelaan perayu, telah tidak menimbangkan keputusan yang paling baru dalam kes *Cohen Lorraine Philis & Anor lwn. Pendakwa Raya* dan *Ng Chai Kem lwn. Pendakwa Raya* bahawa, dalam pendakwaan untuk pengedaran dadah berbahaya, pembelaan mengenai pengambilan sendiri dadah berbahaya tersebut mungkin berbangkit walaupun dalam keadaan di mana kuantiti dadah yang terlibat itu melebihi had minima statutori yang ditetapkan di bawah s. 37(d) Akta.

[5a] Kedua-duanya *Cohen* dan *Ng Chai Kem* telah "seriously watered down" *Teh Geok Hock* sejauhmana ianya mengimbas bahawa pemilikan pasif atau pengambilan sendiri tidak boleh sama sekali menjadi suatu pembelaan kepada tuduhan pengedaran dadah di bawah s. 39(B) Akta. Setelah mempertimbangkan perkara ini semula, kami lebih menyukai pendapat yang diberikan dalam *Cohen* dan *Ng Chai Kem* daripada yang diberikan dalam *Teh Geok Hock.*

[6] Seksyen 2 Akta yang mentakrifkan "trafficking" (pengedaran dadah) mempunyai ungkapan "In this Act, unless the context otherwise requires". Ianya merupakan pendapat kami bahawa, sehubungan dengan hal ini, konteks s. 37(da)(i) sememangnya "otherwise require", kerana jika sebaliknya, peruntukan-peruntukan s. 37(da) yang mana secara khususnya meletakkan pada tertuduh hak untuk menyangkal tanggapan mengedar dadah yang berbangkit daripada didapati berada dalam pemilikan dadah berbahaya yang melebihi had minima statutori, akan merupakan suatu hipokrasi yang tidak bermakna.

[7] Hakim yang bijaksana telah tersalah dalam pengendalian fakta-fakta ketika mempertimbangkan kes itu untuk pihak pembelaan, dan juga telah meletakkan penekanan yang tidak wajar ke atas s. 2 Akta. Sabitan mengedar dadah di bawah s. 39B Akta adalah dengan itu tidak dapat dipertahankan dan jalan yang sebaiknya adalah untuk menggantikannya dengan satu sabitan di bawah s. 6 Akta yang boleh dikenakan hukuman di bawah s. 39(A)(2) Akta.

[Rayuan dibenarkan; sabitan dan hukuman oleh mahkamah di bawah diketepikan dan digantikan dengan sabitan kerana pemilikan di bawah s. 6 Akta dan hukuman 18 tahun pemenjaraan serta 10 sebatan rotan.]

Cases referred to:
Akin Khan Abdul Rahman v. PP [1987] 1 CLJ 348 ***(refd)***
Cohen Lorraine Philis & Anor v. PP [1989] 2 CLJ 956 ***(foll)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(refd)***
Ng Chai Kem v. PP [1994] 2 CLJ 593 ***(foll)***
PP v. Yuvaraj [1969] 2 MLJ 89 ***(refd)***
R v. Bundy 5 Cr App R 270 ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] 1 MLJ 132 ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 6, 12, 37(d), (da)(1), 37A, 39A(2), (B)(1)(a), (2)

[Appeal from High Court, Kuala Lumpur; Criminal Application No: 45-9 of 1993]

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Azahar Mohamed DPP (Kamaruzaman Abdul Jalil with him)

Reported by WA Sharif

JUDGMENT

Edgar Joseph Jr FCJ:

The appellant had been convicted in the High Court, Kota Bharu, for trafficking, on his own behalf, in a dangerous drug, to wit, heroin weighing 86.6 grams, in contravention of s. 39(1)(a) of the Dangerous Drugs Act 1952, ('the Act') and sentenced to death. It was alleged that the offence was committed on the night of 7 January 1993, in the vicinity of Flat Block 391, Jalan Tun Razak, Kuala Lumpur.

The case for the prosecution, in outline, was this: On 7 January 1993 at about 10pm, ASP Mohd. Dzuraidi (PW6) ('Dzuraidi') had received certain information and without further ado, led a party of police personnel from the Cawangan Anti Dadah, Sentul, consisting of Det Cpl. Idris, Det Cpl. Rosli, Det L/Cpl. Hadzir, Det L/Cpl. Ramli, Det Const. Mohd. Adnan (PW7) ('Adnan'), D/Const. Mohd Jidi, D/Const. Mohd Fauzi, D/Const. Zulkifli and D/Const. Chang Sing Kong, for the purpose of laying an ambush in the vicinity of flats in the Pekeliling area, Kuala Lumpur, near Flat No. B 91.

On arrival at the scene, the police party had split into four groups and took up strategic positions.

At about 10.30pm, Dzuraidi saw a motorcycle bearing registration number WBP5958 coming into the ambush area, ridden by the appellant, and proceeding very slowly. Dzuraidi then emerged from his position and, at a distance of about five feet from the appellant, ordered the latter to stop, saying "berhenti", and at the same time, raising his hand. When the appellant pulled up, Dzuraidi noticed that he had dropped a yellow coloured plastic bag (P6) ('the bag') from his left hand. Dzuraidi then moved swiftly towards the appellant and announced his identity, whereupon, the appellant had attempted to run. Dzuraidi then instructed Adnan and L/Cpl. Hadzir to arrest the appellant. In the ensuing struggle, the motorcycle fell to the ground and the appellant was overpowered and handcuffed. Dzuraidi then picked up the bag, showed it to the appellant and exposing its contents, which consisted of two packets, being P9 and P12, wrapped in Chinese newspaper both of which contained plastic packets each of which in turn contained a pinkish powdery substance, suspected to be heroin, the subject matter of the charge, being P9 and P12 ('the heroin'). Dzuraidi then administered the caution under s. 37A of the Act, to the appellant, who elected to remain silent.

Apart from the bag, Dzuraidi also seized from the appellant a pager, the motorcycle, a crash helmet, cash amounting to RM554, a wallet, and a key chain attached to which were four little keys.

The place where the appellant was stopped was brightly lit and, apart from the bag, no other plastic bag was recovered from the scene.

From the scene, the appellant and the articles seized were brought to the Sentul Police Station for preliminary investigation and this resulted in the appellant leading Dzuraidi and his party to Karaoke No. 1, Setapak, ('the Karaoke Lounge'). From there, the police party proceeded to the appellant's house No. 244 A Jalan Air Jerneh, Setapak, where a search resulted in nothing incriminating being recovered. From there, Dzuraidi brought the appellant back to the Sentul Police Station. Once there, Dzuraidi marked the exhibits, and initialed the bag and the packets which contained the heroin. Dzuraidi then made a police report after which he locked the exhibits concerned in his steel cabinet and kept the key to it.

On 8 January 1993, at about 1.15pm, Dzuraidi handed over the appellant and all exhibits seized, including the bag and the heroin, to Insp Annadorai.

When cross-examined by Mr. Karpal Singh, Dzuraidi was emphatic that he had set up the ambush at the place in question after receiving information and that the bag he had seized was the very bag which the appellant had dropped moments before his arrest. Dzuraidi admitted that he had gone to the Karaoke Lounge in search of a male Chinese named Ah Seng.

But, Dzuraidi emphatically denied the suggestion of counsel, that at the time he was arrested the appellant was carrying bread in the carrier of the motorcycle, and iced tea which, together with the bag, hung from the handle of the motorcycle.

The learned trial judge said that having observed the demeanour of Dzuraidi he was satisfied that this officer was a witness of truth. The judge remarked that he was unshaken in cross-examination.

The testimony of Dzuraidi, the judge noted, was supported by Adnan in material respects.

Subsequently, the suspected heroin was examined and analysed by the Government Chemist who confirmed Dzuraidi's suspicions, when he certified that it was indeed heroin, a dangerous drug within the meaning of s. 2 of the Act, weighing 86.6 grams.

Being satisfied that at the time of his arrest the appellant had in his custody and under his control the bag which contained heroin, the judge ruled that the prosecution had successfully invoked the presumption of possession under s. 37(d) of the Act against the appellant. It followed, the judge said, that because the weight of the heroin was in excess of 15 grams, as certified by the Government Chemist, the presumption of trafficking under s. 37(da)(1) of the Act was also successfully invoked by the prosecution.

For the foregoing reasons, the judge ruled that the prosecution had succeeded in establishing a *prima facie* case against the appellant and, he accordingly, called upon the appellant to enter upon his defence.

The case for the defence, as deposed to by the appellant from the witness box, was this:

The appellant admitted that he had been arrested at the time and place mentioned in the charge but not in the circumstances related by the prosecution witnesses. Going back a little, the appellant said that on 6 January 1993 he had received a telephone call from a friend named Tan Kwan Seng (a.k.a. Ah Seng) to meet at the Karaoke Lounge on the following night. He said that he had known Ah Seng for one year prior to his arrest and that Ah Seng had visited him at home on four or five occasions. Ah Seng lived at No. 30, Jalan

11/27 B, Desa Setapak, Kuala Lumpur, and the appellant had also been to Ah Seng's house. The appellant went there riding his motorcycle WBP 5958. On the night in question, the appellant said that he and Ah Seng had had refreshments at the Karaoke Lounge and that while having refreshments, Ah Seng had told the appellant that his (Ah Seng's) friend would be carrying out some repair work on his (Ah Seng's) house. Ah Seng then asked the appellant to go ahead and wait for him at the car park near Block B 91, Jalan Tun Razak, Kuala Lumpur ('the car park'), because he had a little personal matter to settle first, after which he would rejoin him so that both could go to the house which required repairs.

According to the appellant, before he left the Karaoke Lounge to go to the car park, Ah Seng had handed him a loaf of bread, iced tea and a yellow plastic bag which contained something. Ah Seng had told the appellant that the bag contained food. The appellant said that P6 was the same as the bag which Ah Seng had given him. The appellant then proceeded to the car park bringing along with him the bread which had been placed in the carrier and which was tied with a rubber band while the iced tea and the bag were hanging from the fight handle of the motorcycle.

On arrival at the car park, the appellant pulled up, and then, a number of persons pounced on him and attempted to apprehend him. Because he was frightened, the appellant attempted to escape but eventually he was overpowered and handcuffed.

Immediately upon arrest, while still at the car park, Dzuraidi showed him the bag and questioned him, asking:

Who gave the yellow plastic bag?" The appellant replied: "Tan Kwan Seng gave it to me." Immediately after this, he was asked by Dzuraidi to lead the way to the Karaoke Lounge, which he did, proceeding there **directly** from the scene, but on arrival there, Ah Seng was not to be seen. The appellant **denied** that from the scene, he had first been taken to the Sentul Police Station by Dzuraidi and that only after being interrogated there, did he lead the police party to the Karaoke Lounge to look for Ah Seng.

The first witness for the defence was the wife of the appellant Ho Yin Ling. She supported the appellant with regard to the telephone calls the appellant had received from Tan Kwan Seng on 6 January 1993 and with regard to the appellant going to the Karaoke Lounge on the night of 7 January 1993 to meet with Tan Kwan Seng. She also confirmed that prior to the appellant's arrest, Tan Kwan Seng had called on the appellant on four or five occasions.

The judge observed that under the law, the burden of rebutting the statutory presumptions aforesaid was on the defence but the extent of that burden was on the balance of probabilities. In support, the case of *PP v. Yuvaraj* [1969] 2 MLJ 89 was cited.

Next, the judge referred to local cases such as *Akin Khan bin Abdul Rahman v. PP* [1987] 2 MLJ 217 SC and *Mohamad Radhi bin Yaakob v. PP* [1991] 3 MLJ 169 SC which applied Yuvaraj.

The judge then said that before proceeding to consider more closely whether the appellant knew about the contents of the bag it would be appropriate for him to consider whether Tan Kwan Seng (Ah Seng) existed or not. Having studied the testimony of the appellant and his wife, the judge was satisfied that this person did exist. He observed that although Ho Yin Ling was the wife of the appellant, her testimony about Ah Seng could be accepted.

The judge noted that Mr. Karpal Singh had contended that police investigations into this case were unsatisfactory because insufficient steps had been taken to verify the explanation of the appellant concerning the role of Tan Kwan Seng (Ah Seng).

Although the police had not carried out further investigations concerning Ah Seng, the judge repeated that he was satisfied that Tan Kwan Seng (Ah Seng) did exist but considered that apart form the testimony of the appellant, there was no evidence to show that Ah Seng was connected with the heroin recovered from the bag.

The judge recognised that the issue was whether Ah Seng had handed the bag containing the heroin to the appellant. With regard to this, the judge said that it was necessary to study the testimony of the appellant and to compare it with the testimony of the prosecution witnesses, especially Dzuraidi and Adnan, and having done so, he found the explanation of the appellant unacceptable. Furthermore, the judge found that the story that Ah Seng had handed the appellant the bag was not reasonable and was an invention on the part of the appellant to save his own skin. The judge found that the appellant knew that the bag contained drugs. When the appellant was stopped he had dropped the bag and had attempted to run. Why did he drop the bag and attempt to run when he was stopped by Dzuraidi if he really did not know the contents of the bag, particularly, since he had claimed that he thought that the bag contained food given to him by Ah Seng? This, the judge remarked, was not the conduct of a man who really did not know the contents of the bag, but on the contrary, it was because he knew the contents of the bag to be drugs that he had dropped the bag.

The judge went on to observe that the appellant had attempted to contradict the testimony of Dzuraidi that at the time of his arrest, when cautioned and questioned by Dzuraidi, the appellant made no reply.

Having considered the totality of the evidence adduced by the prosecution and the defence, the judge found that at the time and place of his arrest, when he was cautioned the appellant had made no reply. This finding, the judge considered, was amply supported by the testimony of Dzuraidi and Adnan, bearing in mind that neither of these witnesses had any motive to lie on this point.

The judge further found that the appellant was not telling the truth when he testified that it was at the time and place of his arrest that he informed Dzuraidi that it was Ah Seng who handed him the bag but conceded that there was a possibility that the appellant did so inform Dzuraidi while he was being interrogated at the Sentul Police Station, before the party proceeded to the Karaoke Lounge.

The judge also drew attention to the definition of trafficking under the Act. Section 2 of the Act provides:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

The judge then noted that the effect of the above section, according to the Supreme Court case of *Teh Geok Hock v. PP* [1989] 3 MLJ 162 (per Hashim Sani CJ at p. 163), was this:

> The definition of trafficking is wide and includes not only buying and selling, but also carrying, concealing and keeping.

The judge next found that it was clear that the appellant was carrying the bag which contained the heroin. Because the weight of the heroin was more than 15 grams, the presumption of trafficking under s. 37(da) arose.

The judge was thus satisfied that the evidence adduced by the defence had failed to rebut the statutory presumptions aforesaid. Accordingly, he found the appellant guilty, entered conviction, and passed the mandatory sentence of death as required under s. 39(B)(2) of the Act.

In the barest outline, the defence of the appellant was that the bag which contained the heroin had been handed to him by Ah Seng who said that it contained some bread and iced tea, in the circumstances detailed by him. The appellant claimed that at the time and place of his arrest, when cautioned and

questioned by Dzuraidi about the bag, he had there and then disclosed his defence to Dzuraidi and that, as a result, he had led the police party directly from the scene to the Karaoke Lounge to trace Ah Seng but to no avail.

Thus, the defence of the appellant was not a bare denial but an explanation indicating that someone else, not he, was the trafficker.

Before us, the conviction was attacked by Mr. Karpal Singh, chiefly on the ground that the way in which the judge dealt with the defence was unsatisfactory. In particular, he argued that the Judge's criticism that the appellant had made a belated disclosure of his defence was not justified having regard to a particular portion in the testimony of Dzuraidi himself to which we shall refer anon.

More particularly, counsel stressed that the Judge himself had found, contrary to the contention of the Deputy Public Prosecutor during the cross-examination of the appellant, that Ah Seng did exist.

Next, counsel pointed out that there was some corroboration of the defence case, appearing in the testimony of Dzuraidi himself, that after being cautioned, at the time and place of arrest, the appellant had led the police party directly to the Karakoe Lounge in search of the Ah Seng. In support, counsel directed our attention to the following passage in the testimony of Dzuraidi:

> Apabila tertuduh sampai di tempat ia ditangkap saya yang nampak pertama kali. Selepas ditangkap saya beri amaran – tujuan memberi amaran untuk mendapatkan kepastian berkenaan barang yang dirampas. **Selepas itu saya dan anggota-anggota polis pergi ke Karaoke No. 1 Setapak.**
>
> (When the accused arrived at the place where he was arrested it was the first time I saw. After arrest, I cautioned him – the purpose of caution is to obtain confirmation regarding nature of the articles seized. **After that I and a police party proceeded to Karaoke No. 1 Setapak.)**
>
> (Emphasis supplied)

This was a clear indication that when cautioned at the time of his arrest, the appellant must have disclosed his defence, for how else does one account for the police party proceeding from the scene directly to the Karaoke Lounge in Setapak?. This was a point in the evidence for the prosecution which told strongly in favour of the appellant since, having regard to the common course of human conduct, someone who is highly aroused is not likely to have had time to construct lies.

It is true, that at a later stage, this witness resiled from what he had said, and asserted that when cautioned and questioned at the time of his arrest, the appellant had refused to reply, whereupon the police took the appellant to the Sentul Police Station where he was interrogated by Dzuraidi, and it was only subsequently, that the appellant led the police to the Karaoke Lounge in search of Ah Seng but to no avail. The fact, however, remains that at an earlier stage of his cross-examination, Dzuraidi had said something very different and that no attempt had been made by him to explain the contradiction although it was most material. Thus, at the very least, there was, clearly an ambiguity on this particular point in the testimony of Dzuraidi; and there should be no ambiguity upon a matter where the liberty – indeed the life – of a subject is involved.

In this context, it is of crucial importance to note, that in rejecting the defence of the appellant, the Judge had relied heavily on what he thought was the belated disclosure of his defence by the appellant. Here is what his Lordship said:

> I am satisfied and I so find that at the time and place of his arrest, when he was cautioned, the accused made no reply.

And, in the next para of his grounds of judgment, he said:

> I find that the accused was not telling the truth when he testified that it was at the time and place of his arrest that it was Ah Seng who had handed him the bag but there is a possibility that the accused did so inform ASP Mohd. Dzuraidi while he was being interrogated at the police station Sentul before they proceeded to the Karakoe No. 1.

It is obvious, that in making these strong findings of fact adverse to the defence, the Judge had overlooked the earlier testimony of Dzuraidi (quoted above) which corroborated the testimony of the appellant that it was at the time and place of his arrest that the appellant had disclosed his defence. In our view, this indicated a lack of "due appreciation" of the evidence (See *R. v. Bundy,* 5 Cr. App. R 270 per Pickford J, applied in *Gooi Loo Seng v. PP* [1993] 2 MLJ, 137, at 142) and so, was a serious misdirection by way of non-direction for, had the Judge correctly directed himself in this regard, he might well have looked at the defence more sympathetically.

In this situation, it was certainly open to the defence to contend that if the whole matter had been probed, the Judge might have felt unable to accept the police evidence at all on the ground that if the testimony of the police witness was unreliable as to **when** the appellant had made disclosure of his defence, their testimony as to **other matters,** for example, about the bread and the iced tea and about the appellant dropping the bag might also be unreliable. Had such a submission been made, it might or might not have carried weight, but if upheld, it would have led to an outright acquittal.

But, as we have already indicated, Mr. Karpal Singh who argued this appeal with commendable propriety and restraint, did not take this position but was content to concede that at the close of the case for the prosecution it had been proved by affirmative evidence that the appellant had been "found in possession" of the drugs, and that the presumption of trafficking under s. 37(da) of the Act had been correctly invoked by the Judge, though for the wrong reason. (See, the judgment of this court in the case of *Muhammed bin Hassan v. PP* [1998] 2 MLJ 273 where it is held that it was not permissible to pile the presumption of trafficking under s. 37(da) upon the presumption of possession under s. 37(d) of the Act). Mr. Karpal Singh therefore confined his contention to arguing that the presumption of trafficking under s. 37(da) had been rebutted but conceded that because the appellant was in passive possession of the drugs, this was an appropriate case for this court to substitute a conviction for possession in contravention of s. 6 and punishable under s. 39A(2) of the Act.

Now, it is undoubtedly the law, that in a criminal case, we are in no way bound to act on a concession of the sort made by Mr. Karpal Singh in this case but, that we can do so, in an appropriate case, we have no doubt. In this context, we need no more than refer to the numerous instances, when in appeals against conviction for the offence of trafficking in dangerous drugs in contravention of s. 39B of the Act, the prosecution had conceded that the conviction could not stand, but that a conviction for some lesser offence, such as, for possession under s. 6 or even s. 12 of the Act, be substituted, and upon the defence agreeing to such a course, we had invariably, acted on the concession, without query, and substituted a conviction for such lesser offence.

To revert to the grounds of judgment, in considering and rejecting the defence of the appellant, the Judge had, as we have said, relied on the definition of trafficking in s. 2 of the Act set out earlier herein:

And, as we have also noted, the Judge had relied on the Supreme Court case of *Teh Geok Hock v. PP (ibid)*, where the court briefly considered the effect of the definition of trafficking aforesaid and, in particular, the court observed:

> The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffick' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffick' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v. PP* [1981] 1 MLJ 64.

The judge, however, appears to have overlooked the later Supreme Court case of *Cohen Lorraine Philis & Anor. v. P*P [1989] 3 MLJ 289, where the court (per Abdul Hamid LP) held that in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be **available** even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s. 37(da) of the Act, but whether it could succeed would depend upon the particular circumstances of each case. And, in the subsequent case of *Ng Chai Kem v. PP* [1994] 2 MLJ 210, the Supreme Court followed Cohen.

In our view, both *Cohen* and *Ng Chai Kem,* have severely watered down *Teh Geok Hock* in so far as it implies that passive possession or self-administration can never be a defence to a charge of trafficking under s. 39(B) of our Act. Having considered this point afresh, we preferred the views expressed in *Cohen* and *Ng Chai Kem* to those in *Teh Geok Hock* which we regarded as oversimplistic. We would add that apart from the general consideration that the drugs legislation is a piece of highly penal legislation and therefore any ambiguity in it should be resolved in favour of the subject, in accordance with long established canons of construction, it is pertinent to note that the definition of "trafficking" aforesaid comes under s. 2 of the Act, the very first line of which read:

> In this Act, **unless the context otherwise requires**.

In our view the context of s. 37(da)(i) which says:

> any person who is found in possession of:
>
> (i) 15 grammes or more in weight of heroin;
>
> (ii) ...;
>
> (iii) ...;
>
> (iiia) ...;
>
> (iv) ...;
>
> (v) ...;
>
> (va) ...;
>
> (vi) ...;
>
> (vii) ...;
>
> (viii) ...;
>
> (ix) ...; or
>
> (x) ...;

> otherwise than in accordance with the authority of this Act or any other written law, *shall be presumed, until the contrary is proved, to be trafficking in the said drug;*

does *"otherwise require"* (italics supplied). If this were not so, the provisions of s. 37(da) which specifically confer upon the accused **the right** to rebut the presumption of trafficking arising from being found in possession of dangerous drugs in excess of the statutory minimum, would be an empty hypocrisy.

It is also pertinent to note that in the Federal Court case of *Syed Ali bin Syed Abdul Hamid & Anor. v. PP* [1982] 1 MLJ 132, the court referred to the qualification provided in s. 2, that is, that the definition of terms listed thereunder are subject to the requirement of context. Consequently, the court held that if the context appears to have intended a different meaning from that appearing in the definition, the meaning given in s. 2, will not apply. In so holding, the Federal Court said (at p. 134):

> Whilst we may speak of a person in possession of a house, or a place or a premises as an 'occupier' thereof, it is against common usage that any person in control of a motor car is referred to as an occupier of it, although he may properly be described as being in possession of the motor car. The use of the words 'occupier of the premises' instead of the words 'person in possession of the premises' in para. (g) of s. 37 must have been attributable to the intention of the legislature to restrict the definition of 'premises' to its usual and ordinary meaning as understood in common usage and not to give an extended meaning thereto so as to include a motor car.

To sum up, therefore, in the particular circumstances of the present case, bearing in mind, especially, the point that the Judge had erred in his handling of the facts, when considering the case for the defence, the undue stress he had placed on s. 2 of the Act, and the way the arguments developed before us, in our view, the conviction for trafficking under s. 39(B) of the Act was unsustainable and the right course for this court to take was to substitute a conviction for possession in contravention of s. 6 and punishable under s. 39(A)(2) of the Act.

We had, therefore, unaminously allowed the appeal, quashed the conviction, set aside the sentence of death, and substituted, in lieu thereof, a conviction under s. 6 and a sentence of 18 years imprisonment with effect from date of arrest and the minimum 10 strokes of the rottan.